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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CASE FINANCIAL, INC., et al., Plaintiffs and Appellants, v. CANADIAN COMMERCIAL WORKERS INDUSTRY PENSION PLAN et al., Defendants and Respondents.	B258722 (Los Angeles County Super. Ct. No. BS136938)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest M. Hiroshige and Frederick C. Shaller, Judges. Affirmed.

Gladych & Associates, Inc. and John A. Gladych; Law Office of Waddy Stephenson and Waddy Stephenson for Plaintiffs and Appellants.

Isaacs Friedberg & Labaton and Jerome H. Friedberg for Defendants and Respondents.

Case Financial, Inc., L&M Specialties, Inc., Michael Schaffer and Lawrence Schaffer (appellants) appeal from a judgment of the trial court denying their petition to vacate an arbitration award pursuant to section 1286.2 of the Code of Civil Procedure.[1]

CONTENTIONS

Appellants contend that the arbitration award should be vacated due to the arbitrator's failure to make disclosures required under section 1297.121. Appellants further contend that the arbitration award should be vacated due to corruption on the part of the arbitrator. Finally, appellants argue that the trial court erred in failing to permit discovery of a mediated settlement agreement involving the arbitrator and a law firm that had served as counsel for opposing parties in the arbitration.

BACKGROUND FACTS

In November 2007, Canadian Commercial Workers Industry Pension Plan (CCWIPP) and Prime Capital Investments, LLC entered into a written settlement agreement with appellants.[2] The agreement resolved a number of disputes involving matters occurring in the continental United States, Canada, the Bahamas, and St. Croix. It contained a non-disparagement clause which required the parties to refrain from making any disparaging comments about each other. The settlement agreement provided that appellants would be jointly and severally liable for liquidated damages in the event of violation of the non-disparagement clause. The parties explicitly agreed that any disputes of any kind arising under the agreement would be submitted to binding arbitration in accordance with the commercial rules of arbitration utilized by the American Arbitration Association (AAA).

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] CCWIPP, Prime Capital Investments, LLC, and Clifford Evans, a third party beneficiary of the settlement agreement, are collectively referred to as "respondents."

PROCEDURAL HISTORY

The arbitration and the disclosures

On February 17, 2009, respondents filed a demand for arbitration contending that appellants breached the non-disparagement provision of the November 2007 settlement agreement. Respondents claimed entitlement to liquidated damages under the agreement. Respondents also claimed that appellants Michael Schaffer and Case Financial, Inc. had fraudulently entered into the settlement agreement without intending to perform. Respondents sought compensatory and punitive damages for the fraud.

On October 30, 2009, appellants filed an answer and cross-claim. The cross-claim alleged that respondents were liable for breach of contract, specific performance, fraud, breach of the implied covenant of good faith and fair dealing, and intentional interference with contractual relations, among other things. Appellants sought rescission of the settlement agreement.

Respondents were initially represented in the arbitration by the law firm Theodora Oringher, PC (Theodora firm).

On May 12, 2009, the International Centre for Dispute Resolution (ICDR), the international arm of the AAA, appointed Judge Burton Katz (Retired) to act as the arbitrator in this matter. Judge Katz made his initial disclosures at that time, including the disclosure of five prior cases he had worked on in which the Theodora firm had acted as counsel.

On September 30, 2009, Judge Katz issued an order prohibiting the parties from having any ex parte communications with the arbitrator. The order required that counsel must copy opposing counsel or any pro per party before submitting any communication to the AAA case manager or the arbitrator.

On May 13, 2009, Michael Schaffer sent a letter to the ICDR objecting to Judge Katz's appointment based on his initial disclosures. Respondents' counsel objected to Schaffer's letter. They argued that it was improper for Schaffer to send such a letter when he was represented by counsel, and that he had not shown good cause to disqualify

Judge Katz. On May 29, 2009, the ICDR denied Schaffer's challenge and confirmed Judge Katz as arbitrator.

Counsel for respondents discovered that Judge Katz's initial disclosures were incomplete and notified Judge Katz's secretary, Cindy Liu. Respondents' counsel did not correspond directly with Judge Katz. In March 2010 and July 2010, Judge Katz made supplemental disclosures regarding cases he had handled involving the Theodora firm. The parties were given an opportunity to make any objections to the arbitrator's appointment. No such objections were brought.

On July 14, 2010, Judge Katz disclosed that the arbitration award he had issued in another case involving the Theodora firm, *Salvador v. Hirt* (*Hirt*), had been vacated because of an alleged failure by Judge Katz to disclose previous cases involving the Theodora firm in which Judge Katz had been involved. The prevailing party, who had previously been a client of the Theodora firm, brought a claim against Judge Katz and the Theodora firm. At issue was whether there was, in fact, a failure to disclose, and who among the parties bore responsibility for such failure to disclose. Judge Katz indicated that a mediation was contemplated in the matter, and that a potential conflict between the arbitrator and the Theodora firm may exist, depending on the positions each party took in the related matter. Judge Katz then stated:

> "This isolated case will have no impact on my willingness or ability to give both sides in this case a full and fair Arbitration. However, in an abundance of caution, I am offering to recuse myself from further proceedings in this case should either side wish to object. Please advise the Case Manager, Francesca De Paolis . . . , of your decision no later than 3 days from date of receipt of this disclosure."

Each of the appellants affirmatively stated that they had no objection to Judge Katz continuing as arbitrator.

On May 25 and August 2 through 5, 2010, Judge Katz conducted the evidentiary hearing for the arbitration. Michael Schaffer admitted that he sent the disparaging emails in question, and also admitted that he had never intended to abide by the November 2007 settlement agreement.

On April 6, 2011, Judge Katz made a supplemental disclosure of a new matter that he was handling which involved the Theodora firm. The parties did not object to Judge Katz's continued participation in the arbitration, and the ICDR reaffirmed Judge Katz's appointment.

On April 25, 2011, Judge Katz granted CCWIPP's motion for judgment on appellants' rescission claim, and denied appellants' posthearing requests to take additional discovery and resume the hearing.

On August 1, 2011, respondents' lead counsel, Jerome Friedberg, left the Theodora firm, which substituted out of the case and had no further role in the arbitration.

The arbitration award

In January 2012, Judge Katz issued the Partial Final Arbitration Award. Judge Katz awarded CCWIPP and Clifford Evans damages totaling $460,000, and rejected appellants' counterclaim. CCWIPP's request for punitive damages was denied.

The arbitration award resolved all of the substantive claims between the parties. However, Judge Katz found that respondents were also entitled to attorney fees. A further briefing schedule was set for respondents' motion for attorney fees and costs.

Appellants' attempts to disqualify the arbitrator

On June 17, 2011, appellants moved to dismiss the arbitration on the ground that Judge Katz lacked jurisdiction to arbitrate the matter based on Michael Schaffer's initial objection to Judge Katz's disclosures.

On June 20, 2011, the ICDR stated that it would treat the request for dismissal for lack of jurisdiction as a motion to challenge Judge Katz's ability to serve in the matter. The ICDR indicated that it would make a determination on the matter, and requested that the arbitrator not be copied on any further communications on the subject.

On July 7, 2011, while the June 20, 2011 motion was still pending, Michael Schaffer submitted a new motion, captioned as an objection to the continued service of arbitrator Burton Katz on the matter and a request for his disqualification. Schaffer accused Judge Katz of bias and of withholding, minimizing and concealing his disclosures, among other things.

On August 2, 2011, the ICDR denied both of Michael Schaffer's motions and reaffirmed the arbitrator.

On September 17, 2011, Michael Schaffer sent Judge Katz a letter seeking extensive additional disclosures on the *Hirt* matter. In response, Judge Katz stated his position that the matter had been ruled upon by the ICDR and was closed.

Shortly after the arbitration award issued in January 2012, appellants filed a letter to disqualify Judge Katz. The letter, addressed to Judge Katz, asked him to vacate his award and disqualify himself. The ICDR sent the parties an email confirming receipt of the document and reminding the parties that any objections to the arbitrator's appointment should be addressed to the ICDR, not to the arbitrator directly.

Appellants then submitted a formal brief to the ICDR. Appellants argued that the arbitrator had acted with prejudicial misconduct and demonstrated actual bias. They accused Judge Katz of ignoring their arguments and improperly taking judicial notice of certain facts. Appellants did not raise the *Hirt* settlement or any other disclosure issues in the request sent directly to Judge Katz or the motion to the ICDR. On February 9, 2012, the ICDR denied appellants' motion.

On March 27, 2012, appellants made a fourth attempt to disqualify Judge Katz. Appellants sent a letter directly to the ICDR. They claimed that Judge Katz's disclosures were incomplete, but declined to seek disqualification on that ground. Instead, appellants sought to disqualify Judge Katz solely based on communications between the Theodora firm and Judge Katz's secretary, Cindy Liu.

On March 28, 2012, Judge Katz stated that he would await the ICDR's ruling on appellant's motion. He stated that "I have never personally had any ex parte contact with Mr. Friedberg or his associates or his co-counsel period." In addition, Judge Katz stated that he had "no knowledge of any alleged contact Cindy Liu may have had with Mr. Friedberg's office, independent of the ICDR and the Respondents."

Judge Katz's resignation

On April 5, 2012, Judge Katz sent a resignation letter to the case manager at ICDR. The letter contained the following explanation of Judge Katz's resignation:

"On March 29, 2012, between 5-6 pm, I received a telephone call from Judge Steven Cohen, my former *associate* at Cohen and Associates. You may recall that Cohen and Associates administered all my AAA cases, including CCWIPP, until I left Cohen and Associates effective Aug 18, 2010. Judge Cohen is currently sitting as an Administrative Judge.

"I was totally unaware of the subject matter he was about to raise. He advised me that he had just received an e-mail from Michael Schaffer about the CCWIPP case and decided to call Michael Schaffer back.

"I have not seen the e-mail nor did I inquire about the same nor am I aware of its contents. Judge Cohen seemed very upset.

"Judge Cohen related to me that he (Michael Schaffer) was very angry with me, but '***if I recused myself from this case and vacated my previous award that he would not sue me.***'

"This, apparent attempt to influence me, coming on the heels of the ICDR receiving a letter from Michael Schaffer's new attorney, *Adam Resiner*, (a copy of which you have distributed to all), who has been retained to file a Superior Court Action for vacatur of my Award(s) in this case, needs to be immediately disclosed to you and the AAA for your consideration.

"I discontinued the conversation with Judge Cohen, as I did not wish to have any further discussions with him about this matter. I have not been in contact with him nor have I talked to him since that brief conversation.

"Following my March 30, 2012 letter, to you, initially notifying you of the contact between Michael Schaffer and Judge Cohen, I have given soulful thought and consideration to the impact on me as well as on any public perception of the propriety of my continuing as Arbitrator in this case. Also, I have given due consideration to any adverse effect that might be unfairly cast on the ICDR, were I to continue as Arbitrator in this case.

"*In light of the foregoing, I believe it is in the best interests of all parties and the ICDR that I step down from this case.*"

Judge Katz made it clear in his letter that he strongly believed the partial final award issued in the case was grounded on the facts and applicable law. He stated that the award was not influenced by any extraneous facts or prejudice. Judge Katz emphasized

that the award was fair and based solely on the evidence. He asked that the award be upheld.

Superior court proceedings

On April 18, 2012, appellants filed their petition to vacate the arbitration award pursuant to section 1286 et seq. Appellants argued that Judge Katz had not made timely or complete disclosures and engaged in improper ex parte communications through his secretary, Ms. Liu.

On July 3, 2012, respondents filed a cross-petition to confirm the award.

The trial court permitted limited discovery in connection with the pending petitions. In August 2012 appellant served subpoenas on the Theodora firm and Judge Cohen seeking the production of the *Hirt* settlement and related documents.

In October 2012, the Theodora firm filed a motion to quash, arguing that the *Hirt* settlement agreement was subject to the mediation privilege and therefore protected from discovery. In January 2013, the trial court granted the motion to quash, finding that appellants had not established any exception to mediation confidentiality.

In March 2014, the trial court issued a denial of the petition to vacate the arbitration award and granted the petition to confirm the award. As to the alleged ex parte communications, the court held:

> "[T]he Court finds that there is insufficient evidence of prejudice to [appellants] to vacate the award based on this communication. There is no evidence that the Theodora firm communicated directly with Judge Katz, or that it discussed the merits of the case with Liu. . . . [Appellants] submit no evidence on which it could be reasonably inferred that the *ex parte* communication influenced Judge Katz's decision on the merits of the case. There is also insufficient evidence that this type of *ex parte* communication with support staff regarding the arbitrator's disclosures is uncommon or improper."

The court pointed out that Judge Katz offered to recuse himself following his disclosure that the *Hirt* award had been vacated and that a mediation involving the Theodora firm was contemplated. The court stated, "The *ex parte* communication discussed above, as well as the alleged non-disclosures cited by [Appellants] and the

mediation between Judge Katz and the Theodora firm, do not reflect an attempt to influence Judge Katz with respect to the merits of the case. Under the circumstances, the communications between Judge Katz's staff and the Theodora firm regarding disclosures merely reflects an attempt by Judge Katz to ensure all disclosures were made, as opposed to evidence of bias."

The trial court took the position that because the arbitration award arose from an international arbitration, it may not be vacated for failure to make the required disclosures under section 1297.121. The court cited *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 824 (*Howsam*).)

On August 25, 2014, the trial court filed its amended interlocutory judgment confirming arbitration award and ordering further arbitration proceedings. On September 8, 2014, appellants filed their notice of appeal.

DISCUSSION

I. The judgment is appealable

The parties agree that the matter is appealable. In this case, the judgment was captioned as an interlocutory judgment. Nevertheless, it resolved all issues except costs and attorney fees. A judgment that resolves every issue presented except the amount of attorney fees to be awarded to the prevailing party is final and appealable. (*P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053-1054.)

II. Applicable law and standard of review

The California Arbitration Act (§ 1280 et seq.) "'represents a comprehensive statutory scheme regulating private arbitration in this state.' [Citation.]" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 380 (*Haworth*).) "'[I]t is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final.' [Citation.]" (*Ibid.*) "Generally, in the absence of a specific agreement by the parties to the contrary, a court may not review the merits of an arbitration award. [Citation.]" (*Ibid.*)

An award may be vacated on the grounds set forth in section 1286.2, subdivision (a). (*Howsam, supra*, 208 Cal.App.4th at p. 817.) The statute provides:

> "(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:
>
> "(1) The award was procured by corruption, fraud or other undue means.
>
> "(2) There was corruption in any of the arbitrators.
>
> "(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
>
> "(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
>
> "(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
>
> "(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives."

"[T]he disclosure duties and the consequences of a failure to disclose differ in domestic and international commercial arbitrations." (*Howsam, supra*, 208 Cal.App.4th at p. 819.) In 1988, the Legislature expressly stated that international commercial arbitrations are not subject to sections 1280 through 1284.2. (§ 1297.17; *Howsam*, at p. 821.) Thus, "section 1297.121 is the controlling disclosure statute in international

commercial arbitrations, not sections 1281.9 and 1281.91. [Citations.]"[3] (*Howsam*, at p. 824.) The failure to disclose a section 1297.121 disqualifying ground is not a basis for vacatur under section 1286.2, subd. (a)(6). (*Howsam*, at p. 824.)

The standard of review applicable to the superior court's decision when the award has been challenged in that court on the ground that the arbitrator failed to disclose circumstances creating an appearance of partiality is de novo. (*Haworth, supra*, 50 Cal.4th at p. 383.)

III. The award is not subject to vacatur under section 1286.2 due to a lack of disclosure regarding the *Hirt* mediation

Appellants challenge the trial court's decision that the arbitration award in this case was not subject to vacatur under section 1286.2.

Appellants frame this as a pure question of law: whether an arbitration award can be vacated under section 1286.2 when the award arises from the arbitration of international commercial disputes.

Appellants argue that the trial court did not address the question of whether the arbitrator in the underlying arbitration failed to make the disclosures as required by statute.

A. Judge Katz did not violate his obligation to disclose

We disagree with the appellants' position that the trial court did not address the question of whether the arbitrator made all required disclosures. The trial court noted that "Judge Katz offered to recuse himself after his disclosure that the *Salvador v. Hirt* arbitration award had been vacated and that a mediation was contemplated involving the Theodora firm . . . [appellants] nevertheless agreed to complete the arbitration with Judge Katz." The trial court later noted that Judge Katz "disclosed the mediation in his July 12,

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[3] The disclosure obligations under section 1281.9 differ from those set forth under section 1297.121. Under section 1281.9, an arbitrator is required to disclose prior or pending proceedings in which the arbitrator served and a lawyer for one of the parties participated. (See § 1281.9, subd. (a)(3), (a)(4).) Under section 1297.121, such a disclosure is not specifically required. (§ 1297.121, subd. (a)-(f).)

2010 correspondence." There is no indication in the trial court's order that the arbitrator failed to make any required disclosures.

Our independent review of the record leads us to the same conclusion. In an international commercial arbitration such as the one at issue here, section 1297.121 is the controlling statute. As relevant, the statute requires disclosure, within 15 days, of "personal bias or prejudice concerning a party" (§ 1297.121, subd. (a)), or having "served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding" (§ 1297.121, subd. (c)). Section 1297.121 does not specifically require disclosure where the arbitrator has served in another proceeding involving an attorney for one of the parties.

Nevertheless, Judge Katz initially disclosed several prior matters for which he had served as arbitrator and the Theodora firm had participated as counsel. The record reveals that while Judge Katz omitted certain of these matters from his initial list of disclosures, he eventually provided complete disclosures of all previous matters involving the Theodora firm. This included a disclosure that the *Hirt* award had been vacated because of an alleged failure by Judge Katz to disclose previous cases involving him and the Theodora firm. Judge Katz indicated that a mediation was contemplated in the matter, and that a potential conflict between the arbitrator and the Theodora firm may exist, depending on the positions each party took in the related matter. Judge Katz then stated:

> "This isolated case will have no impact on my willingness or ability to give both sides in this case a full and fair Arbitration. However, in an abundance of caution, I am offering to recuse myself from further proceedings in this case should either side wish to object. Please advise the Case Manager, Francesca De Paolis . . . , of your decision no later than 3 days from date of receipt of this disclosure."

Each of the appellants affirmatively stated that they had no objection to Judge Katz continuing as arbitrator.

B. Appellants forfeited any objections based on the **Hirt** *mediation*

After Judge Katz disclosed the vacatur of the award in *Hirt*, and revealed that the matter would proceed to mediation, appellants expressly agreed to continue the arbitration. Appellants were aware of the *Hirt* settlement before the arbitration award was issued, yet they did not seek to disqualify Judge Katz on that basis. In fact, when appellants later sought to disqualify Judge Katz, they expressly stated that they were not moving to disqualify him on the grounds of alleged improper disclosures.

The international commercial arbitration statutes expressly provide that objections are forfeited if they are not timely raised. Section 1297.41 provides:

> "A party who knows that any provisions of this title, or any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his or her objection to noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to object."

California courts have similarly held that a party must timely raise any objections to the arbitrator's service, or those objections are forfeited. (See, e.g., *Dornbirer v. Kaiser Foundation Health Plan, Inc.* (2008) 166 Cal.App.4th 831, 846 [petitioner waived her objections to the arbitrator because she agreed to proceed with the arbitration even though she knew that the arbitrator's disclosures were incomplete]; *Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal.App.4th 1085, 1096-1098 [appellant waived an objection to the arbitrator on the ground of his business relationship with a party because appellant had knowledge of the business relationship and did not seek further disclosures].)

The policy reasons behind the rule requiring timely objection to an arbitrator were discussed in *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332. In that case, the court discussed the requirement under section 170.3, subdivision (c), that a litigant seek a judge's disqualification "'at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.' [Citation.]" (*Tri Counties*, at p. 1337.) The purpose behind this requirement is that it would be

“‘“‘“‘intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.’”’’ [Citation.]” (*Ibid.*) Under these authorities, any objection based on Judge Katz’s failure to disclose the *Hirt* vacatur and mediation are forfeited.

Appellants now claim that although Judge Katz disclosed the claims in the *Hirt* matter and disclosed that a mediation was contemplated, he never disclosed that the decision to mediate those claims had been made, that a mediation had taken place, that the mediation resulted in a mediated settlement agreement in which both Judge Katz and the Theodora law firm were signatories, or any of the terms of the resulting settlement agreement. Appellants also complain that Judge Katz did not disclose that he resigned from all other pending cases involving the Theodora firm and that he would be prevented from providing subsequent disclosures regarding the mediation. Appellants cite no law suggesting that such detailed disclosures are required.

Judge Katz disclosed the vacatur of the *Hirt* matter and the contemplated mediation. He offered to recuse himself at the request of any party. Where, as here, no new circumstances creating a potential for bias subsequently arose, we decline to hold that detailed disclosures regarding the mediation proceedings and the outcome of those proceedings are required.[4]

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[4] Appellants argue that by entering the confidential mediation process in the *Hirt* matter, Judge Katz created a situation where he could not continue to comply with his ongoing disclosure obligations. We find that such action did not constitute a violation of Judge Katz’s disclosure obligations under the circumstances of this case. First, Judge Katz disclosed that mediation was contemplated in the *Hirt* dispute. The confidentiality of mediation is well established under California law, and if appellants had an objection to Judge Katz participating in such a confidential procedure, they were obligated to express it at the time of that disclosure. In addition, Judge Katz could not unilaterally waive the confidentiality of mediation. In order to waive such protections, the agreement of all parties to the mediation agreement is required. (Evid. Code, § 1123, subd. (c).) We cannot impose upon Judge Katz a requirement that he ensure that all parties agreed to waive the confidentiality of the mediation. For these reasons, this argument fails.

C. Vacatur is improper under section 1286.2, subdivision (a)(6)

Even if the record revealed a failure to comply with the disclosure obligations on the part of Judge Katz, such a failure does not render an international commercial arbitration award subject to vacatur under section 1286.2, subdivision (a)(6). The trial court correctly noted this, and the trial court's decision on this legal issue did not constitute error. (*Howsam, supra*, 208 Cal.App.4th at p. 824.)

D. The actions of the arbitrator in failing to make detailed disclosure of the mediation proceedings does not constitute corruption or fraud under section 1286.2, subdivisions (a)(1) and (a)(2)

Appellants complain that the trial court did not discuss its argument that alleged failures to disclose rendered the arbitration award subject to vacatur on the grounds of corruption under section 1286.2, subdivisions (a)(1) and (a)(2). Appellants correctly point out that the *Howsam* court limited its holding to a conclusion that "noncompliance with section 1297.121 is not a proper ground for a postaward judicial vacatur order under section 1286.2, subdivision (a)(6)." (*Howsam, supra*, 208 Cal.App.4th at p. 824.) The *Howsam* court did not determine that an international commercial arbitration award is not subject to vacatur for corruption under section 1286.2, subdivisions (a)(1) or (a)(2).

Appellants cite a line of cases discussing corruption as a grounds for vacating an arbitration award. The first case is *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968) 393 U.S. 145 (*Commonwealth*), in which it was held that an arbitrator who had served as a consultant for one of the parties to the arbitration should have disclosed this relationship under section 10 of the Federal Arbitration Act. (*Id.* at pp. 146-148). Section 10 permits vacation of an award where it was procured by undue means or where there was evident partiality. (*Id.* at p. 147.) The high court concluded that "any tribunal permitted by law to try cases and controversies not only must be unbiased but must avoid even the appearance of bias." (*Id.* at p. 150.) In *Michael v. Aetna Life & Casualty Ins. Co.* (2001) 88 Cal.App.4th 925, superseded by statute as stated in *Mahnke v. Superior Court* (2009) 180 Cal.App.4th 565, 576-577 (*Michael*)), the court held that "where an appraiser or arbitrator fails to disclose matters required to be

disclosed by section 1281.9, subdivision (e), and a party later discovers disclosure should have been made, that failure to disclose constitutes one form of 'corruption' for purposes of section 1286.2, subdivision (b) and thus provides a ground for vacating an award." (*Michael, supra,* at p. 937.)

The questions of whether this holding in *Michael* remains valid despite the subsequent revision of the statute, and whether the Legislature intended subdivisions (a)(1) and (a)(2) of section 1286.2 to permit vacatur of an international commercial arbitration for failure to disclose, appear to be questions of first impression. However, we conclude that the present matter does not require us to reach these novel questions of law because the conduct at issue does not constitute corruption or fraud.

In *Michael*, a fire insurance appraisal award was at issue. The appraiser had failed to disclose an ongoing business relationship with the insurer, Aetna, to the insured. The appraiser had worked for Aetna on prior occasions. The trial court found that the appraiser's failure to disclose this prior business relationship prohibited the appraiser from acting in his role in that matter, and therefore vacated the order. The *Michael* court reversed, on the ground that the appraiser did not have a substantial ongoing employment relationship with Aetna, and a person aware of the facts would not reasonably entertain a doubt that the appraiser would be impartial. (*Michael, supra*, 88 Cal.App.4th at p. 941.)

In *Banwait v. Hernandez* (1988) 205 Cal.App.3d 823 (*Banwait*), also cited by appellants, the arbitrator failed to disclose that he had once been represented as a client by the law firm representing the insurer in the underlying arbitration. The trial court found that the prior representation did not constitute a substantial business relationship, but nevertheless vacated the arbitration award. The Court of Appeal reversed. The *Banwait* court noted that California appellate courts had uniformly held that *Commonwealth* should govern the application of subdivisions (a) and (b) of section 1286.2. (*Banwait, supra,* at p. 828.) However, it found that the trial court's findings precluded any conclusion that the arbitrator was corrupt or biased, thus there was no basis for setting aside the award. (*Id.* at p. 832.)

Similarly, here, the record reveals no basis to conclude that the arbitrator's failure to disclose the details of the mediation rose to the level of corruption or fraud. The arbitrator disclosed the vacatur of the *Hirt* award, and disclosed the potential mediation. Each party expressly declined the arbitrator's offer to recuse himself on the basis of those disclosures. Appellants had sufficient information at that time to object if appellants were concerned with the details of that mediation. As the *Howsam* court noted, "Only extrinsic fraud which denies a party a fair hearing may serve as a basis for vacating an award. [Citations.]" (*Howsam, supra*, 208 Cal.App.4th at p. 825.)[5] Appellants have failed to show that they have been denied a fair hearing under the circumstances of this case.

Because the arbitrator's action in this matter does not rise to the level of corruption or fraud contemplated in section 1286.2, subdivisions (a)(1) and (a)(2), we decline to determine whether an international commercial arbitration award is subject to vacatur under those provisions on the ground of insufficient disclosures.

IV. The award is not subject to vacatur under section 1286.2 due to communications between the Theodora firm and Cindy Liu

In their final attempt to disqualify Judge Katz, appellants claimed that the Theodora firm had engaged in improper ex parte communications with Judge Katz's secretary, Cindy Liu.[6]

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[5] In addition to arguing for vacatur under section 1286.2, subdivision (a)(6), the appellants in *Howsam* argued for vacatur under section 1286.2, subdivision (a)(1) on the ground that the arbitrator had engaged in improper ex parte communications with the arbitration provider, threatened to default defendants if they failed to pay his fee in advance, and overbilled, among other things. (*Howsam, supra*, 208 Cal.App.4th at pp. 824-825.)

[6] From the commencement of the arbitration until July 2010 when she was fired for embezzlement, Cindy Liu was an employee of Cohen & Associates, LLC, an LLC owned by administrative law judge Steven Cohen. Judge Katz was an associate of Cohen & Associates, LLC from the commencement of the arbitration until August 2010. Cindy Liu was Judge Katz's administrative assistant and her duties included the submission, on Judge Katz's behalf, of his disclosures to the AAA.

Judge Katz denied any ex parte communications with the Theodora firm, stating: "I have never personally had any ex parte contact with Mr. Friedberg or his associates or his co-counsel period." In addition, Judge Katz stated that he had "no knowledge of any alleged contact Cindy Liu may have had with Mr. Friedberg's office, independent of the ICDR and the Respondents."

The trial court held that there was insufficient evidence of prejudice to appellants to vacate the award based on the communication between the Theodora firm and Cindy Liu. There was no evidence that the Theodora firm communicated directly with Judge Katz, or that anyone from the Theodora firm discussed the merits of the case with Liu. In addition, the trial court held that there was insufficient evidence that this type of ex parte communication with support staff regarding the arbitrator's disclosures is uncommon or improper.

Ex parte communications with Judge Katz's staff for the purpose of ensuring full disclosures were not prohibited. In his September 2009 order, Judge Katz expressly prohibited the parties from having any ex parte communications with the arbitrator. The order did not include a prohibition on communications with Judge Katz's staff.

In general, ex parte communications with court staff regarding administrative matters are permitted under California law. (*Blum v. Republic Bank* (1999) 73 Cal.App.4th 245, 248-249 [sanctions for ex parte communication with court clerk to schedule status conference reversed where no authority enabled the trial court to impose such sanctions and the communication was not unlike many communications that attorneys make with court staff over scheduling or other administrative matters]; see also Rules of Professional Conduct, rule 5-300, subd. (B) and (C) [prohibiting ex parte communications with judicial officers or court personnel who participate in the decision-making process].) Appellants cite no law prohibiting ex parte communications with an arbitrator's secretary for the purposes of ensuring full disclosures. The instruction sheet and arbitration rules cited by appellants do not prohibit such communication.

Furthermore, ex parte communications can only serve as a basis for vacating an award under section 1286.2 if such communications caused prejudice to the complaining

party. (*Howsam, supra*, 208 Cal.App.4th at p. 826.) "'In the absence of a showing that the arbitrator was improperly influenced or actually considered evidence outside the original arbitration proceedings such that appellants needed a further opportunity to be heard . . . appellants cannot demonstrate that the amended award was procured by corruption, fraud, undue means, or misconduct of the arbitrator within the meaning of section 1286.2, subdivisions (a), (b) or (c). [Citation.]" (*Id.* at p. 825.) Here, appellants have not shown that they were prejudiced by the Theodora firm's communications with Cindy Liu regarding Judge Katz's disclosures.

In *Howsam*, the appellants argued that the arbitrator had improper ex parte communications with the arbitration provider. The *Howsam* court rejected that argument, stating that "[n]o decisional authority holds that counsel must be present when an arbitrator communicates with an arbitration administrator." (*Howsam, supra*, 208 Cal.App.4th at p. 827.) In addition, the topic of the communication -- which was the arbitrator's duty to disclose -- was "perfectly legitimate." Specifically, "[t]he arbitrator wanted to verify if, under the alliance rules, he had to disclose the fact he had signatory authority over a client's account." (*Ibid.*) Similarly, here, the communications were focused on full disclosure. There was no evidence whatsoever that the merits of the case were discussed between Ms. Liu and the Theodora firm, or that there was any attempt to influence Judge Katz. Absent a showing of prejudice, such communications cannot provide the basis for vacatur. (*Id.* at p. 826.)

Because the arbitrator's action in this matter does not rise to the level of corruption or fraud contemplated in section 1286.2, subdivisions (a)(1) and (a)(2), we decline to determine whether an international commercial arbitration award is subject to vacatur under those provisions. [7]

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[7] Appellants cite *Michael* for the proposition that the award should be vacated because Judge Katz's purported failures to disclose, taken together, demonstrate a reasonable impression of bias. As explained above, *Michael* involved a failure to disclose a prior business relationship between the arbitrator and a party to the arbitration. The *Michael* court ultimately concluded that the arbitrator did not perform substantial work for the party and therefore, "a person aware of the facts would not reasonably

V. The trial court did not err in refusing to order production of the mediation settlement and related mediation information

In the trial court proceedings, the parties were permitted to conduct discovery. Appellants issued a deposition subpoena to Judge Steven Cohen requiring his appearance to testify and for production of documents, including "[a]ny settlement agreements, notes, documents which reference or demonstrate negotiations and/or settlement involving Judge Burton S. Katz, Cohen & Associates, Inc., and the Theodora Oringher law firm and Dr. Michael Hirt."

In response to this subpoena, and a similar subpoena served on the Theodora firm, the Theodora firm filed a motion to quash and sought a protective order prohibiting the production of privileged, confidential and private documents. In a ruling issued on January 18, 2013, the trial court granted the Theodora firm's motion to quash. The trial court noted that Evidence Code section 1119 prohibits discovery of anything written or said in the course of or pursuant to mediation. (Evid. Code, § 1119). Exceptions to this general rule are stated in Evidence Code section 1123; however, the trial court found that appellants did not establish any of the exceptions set forth under section 1123. While the agreement at issue stated that it was admissible and subject to disclosure, such disclosure was solely for the purpose of establishing in court that an agreement had been reached by the parties for the purpose of enforcing and interpreting that agreement.

Appellants argue that the trial court's ruling was both incorrect and overly broad. First, appellants argue, the settlement agreement was discoverable under Evidence Code section 1123, subdivision (b), which provides:

> "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

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entertain a doubt that [the arbitrator] would be able to be impartial." (*Michael, supra*, 88 Cal.App.4th at p. 941.) Similarly here, an individual aware of all of the failures to disclose of which appellants accuse Judge Katz would not reasonably entertain a doubt that Judge Katz would be able to remain impartial.

"[¶] . . . [¶]

"(b) The agreement provides that it is enforceable or binding or words to that effect."

Because the resulting settlement agreement was found to be enforceable by the trial court, appellants argue, the exception identified in subdivision (b) of Evidence Code section 1123 would apply.

"Management of discovery generally lies within the sound discretion of the trial court. [Citations.] Where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court." [Citation.] The trial court's determination will be set aside only when it has been demonstrated that there was 'no legal justification' for the order granting or denying the discovery in question. [Citations.]" (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612.)

Here, there is legal justification for the trial court's order. Communications relating to mediation are protected from disclosure unless all mediation participants give their express consent. (Evid. Code, § 1122, subd. (a)(1); *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 364.)[8] The trial court noted that the Theodora firm stated in its motion that the language of the *Hirt* settlement agreement provides that the agreement is admissible and subject to disclosure "*solely for the purpose of establishing in court that an agreement has been reached by the parties for the purposes of enforcing and interpreting the agreement*." The trial court held that this language "cannot be interpreted to mean that the parties consented to disclosure for any purpose or in any subsequent litigation."

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8 The evidentiary restriction on mediation confidentiality is not limited to those communications made in the course of mediation. It also covers "any written or oral communication made 'for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,' as well as all 'communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation . . . .' [Citation.]" (*Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150-151.)

Appellants provide no evidence that the *Hirt* settlement agreement contained any broader language. Absent evidence of an express agreement that the mediation settlement would be discoverable and admissible to third parties, it cannot be disclosed for such purposes. (See *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 199-200 [holding that arbitration clause in mediation settlement agreement did not render the agreement admissible].) Mediation participants cannot impliedly waive their confidentiality rights. (*Eisendrath v. Superior Court, supra*, 109 Cal.App.4th at p. 362.)

"[T]he mediation confidentiality provisions of the Evidence Code were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings. [Citations.]" (*Fair v. Bakhtiari, supra*, 40 Cal.4th at p. 194.) "Toward that end, 'the statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception.' [Citations.]" (*Ibid.*) Section 1123, subdivision (b) must be interpreted narrowly, with consideration of the legislative purpose it was meant to serve. (*Id.* at p. 197.) As such, we must give deference to the parties' clear expression of the settlement terms, including their agreement to limit subsequent disclosure of the agreement to situations calling for enforcement or interpretation of the agreement.

In general, the mediation confidentiality statutes are intended to be applied broadly, and the exceptions to mediation confidentiality are to be applied narrowly. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 127.) "The Supreme Court has repeatedly resisted attempts to narrow the scope of mediation confidentiality. The court has refused to judicially create exceptions to the statutory scheme, even in situations where justice seems to call for a different result. Rather, the Supreme Court has broadly applied the mediation confidentiality statutes and has severely curtailed courts' ability to formulate exceptions." (*Wimsatt v. Superior Court, supra*, 152 Cal.App.4th at p. 152.) Appellants have failed to show that an exception to mediation confidentiality exists here, and under the clear direction of the Supreme Court, we decline to create one.

Appellants cite *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289 as support for their argument. However, *Provost* concerned

enforcement of a settlement agreement by a party to the agreement, and therefore does not apply to the matter before us. Appellants cite no authority suggesting that Evidence Code section 1123, subdivision (b) applies to permit discovery of a mediation settlement to a third party where the parties to the mediation have expressly limited its disclosure.

Appellants further argue that even if the mediation agreement itself is not discoverable, information surrounding the mediation, such as when it began, when it ended, and who attended the mediation are not protected. Appellants cite *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal. 4th 1, 18, fn. 14 [noting that "neither [Evidence Code] section 1119 nor section 1121 prohibits a party from revealing or reporting to the court about noncommunicative conduct, including violation of the orders of a mediator or the court during mediation"]; *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566, 571 [noting that the mediation confidentiality rules do not prohibit a party from advising the court about conduct during mediation that might warrant sanctions].)

Appellants fail to cite to a specific discovery request which was erroneously denied under these authorities. Appellants have not responded to the argument, set forth in the respondents' brief, that appellants forfeited any claim to noncommunicative discovery regarding the mediation. Instead, appellants limited their discovery request to the settlement agreement and communications between the Theodora firm and Judge Katz. Under the circumstances, we find that any request for noncommunicative information relating to the mediation agreement was forfeited.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT